

**Hixon v 12-14 E. 64th Owners Corp.**

2017 NY Slip Op 32332(U)

October 25, 2017

Supreme Court, New York County

Docket Number: 157114/16

Judge: Lynn R. Kotler

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

VERINA HIXON

INDEX NO. 157114/16

- v -

MOT. DATE

MOT. SEQ. NO. 003

12-14 EAST 64TH OWNERS CORP. et al.

The following papers were read on this motion to/for summary judgment
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits
Notice of Cross-Motion/Answering Affidavits — Exhibits
Replying Affidavits
NYSCEF DOC No(s)
NYSCEF DOC No(s)
NYSCEF DOC No(s)

Defendants 12-14 East 64th Owners Corp. (the "co-op"), Eric Juneau Blair and Matthew Mirones (collectively the "co-op defendants") move for summary judgment dismissing the complaint, a hearing on attorneys fees in connection with the co-op defendants first counterclaim and sanctions. Plaintiff opposes the motion and cross-moves for partial summary judgment. The co-op defendants oppose the cross-motion. This action has already been dismissed against Robert Renzulli (decision/order dated March 15, 2017). There is no proof that the amended complaint was ever served on the remaining defendant Traffic Moving Systems, Inc.

Issue has been joined but note of issue has not yet been filed. Therefore, summary judgment relief is available. The court's decision follows.

This case arises from plaintiff's eviction from the co-op and the resultant sale at a public auction. There is a lengthy history between the co-op and plaintiff which this court need not detail here. Suffice it to say that there were seven lawsuits resulting from plaintiff's defaults and/or actions in connection with the subject unit prior to the instant action. In her amended complaint, plaintiff's remaining causes of action are as follows: [1] a declaration that the co-op's conduct was "commercially unreasonable"; [2] breach of fiduciary duty; [3] unjust enrichment; [4] an accounting; [5] conversion; [6] negligent bailment; and [7] breach of warranty. The co-op's motion for summary judgment on all these claims must be granted.

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 [1985]; Zuckerman v. City of New York, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (Zuckerman, supra). If the proponent

Dated: 10/25/17

HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [ ] GRANTED [ ] DENIED [X] GRANTED IN PART [ ] OTHER
3. Check if appropriate: [ ] SETTLE ORDER [ ] SUBMIT ORDER [ ] DO NOT POST [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

When viewing the commercial reasonableness of a sale, courts look to the totality of the circumstances and the manner in which the sale was conducted (*DeRosa v. Chase Manhattan Mtge. Corp.*, 10 AD3d 317 [1st Dept 2004]). The co-op has established that the sale of the subject unit by public auction was routine and proper and in turn plaintiff has failed to raise a triable issue of fact. Indeed, the case relied upon by plaintiff, *Anchev v. 335 W. 38th St. Co-op Corp.* (29 Misc 3d 1223(A) [Sup Ct. NY Co. 2010]), is wholly inapplicable. Nor has plaintiff established that the unit was sold for less than what it was worth through any admissible evidence. Otherwise, the co-op's decisions with respect to prospective purchasers, to the extent that said purchasers existed, is protected by the business judgment rule (see i.e. *Silverstein v. Westminster House Owners, Inc.* 50 AD3d 257 [1st Dept 2008]). Therefore, the first cause of action is dismissed.

To establish a prima facie case for breach of fiduciary duty, a plaintiff must allege: (1) the existence of a fiduciary relationship; (2) misconduct by the defendant; and (3) damages directly caused by the defendant's misconduct (*Village of Kiryas Joel v. County of Orange*, 144 AD3d 895 [2d Dept 2016]). Assuming arguendo that the co-op defendants owe a duty to a former shareholder, the second cause of action still fails. To the extent that plaintiff argues that the co-op defendants took more than it was entitled to from the sale proceeds, these claims are wholly unsubstantiated. Otherwise, the co-op defendants have demonstrated that the amounts deducted were proper and comprised of additional unpaid maintenance, repairs and removal of HPD violations, capital assessments and attorneys fees incurred in prosecuting and defending actions while plaintiff was in default under the proprietary lease. Contrary to plaintiff's position, the co-op was entitled to recoup its reasonable legal fees pursuant to Section 28 of the proprietary lease. Therefore, the second cause of action is severed and dismissed.

An unjust enrichment claim is a quasi-contract arising when a defendant was enriched at plaintiff's expense and it is against equity and good conscience that defendant retain what is sought to be recovered (*Travelsavers Enterprises, Inc. v. Analog Analytcs, Inc.*, 149 AD3d 1003 [2d Dept 2017]). An unjust enrichment claim does not lie where there is an enforceable agreement between the parties (*Accurate Copy Serv. of America, Inc. v. Fisk Bldg. Assocs. L.L.C.*, 72 AD3d 456 [1st Dept 2010] citing *Singer Asset Fin. Co., LLC v. Melvin*, 33 AD3d 355, 358 [2006]). Relatedly, plaintiff seeks an accounting of the proceeds from the sale of the unit.

Since the co-op had a first lien on plaintiff's shares of stock for any and all unpaid maintenance charges or other indebtedness, it was entitled to collect those amounts from the proceeds of the sale. To the extent that plaintiff claims that the attorneys fees which the co-op recouped were not reasonable, a triable issue of fact remains. Plaintiff received an accounting of the sale proceeds prior to the commencement of this action and the co-op defendants argue that plaintiff failed to timely object to it, citing *Bell v. Alden Owners, Inc.*, 299 AD2d 207 [1st Dept 2002]. *Bell* is, however, distinguishable.

In that case, the First Department found that a plaintiff failed to timely object to an accounting which had been provided pursuant to the directives of the bankruptcy court. Here, we have no such deadlines. Rather, plaintiff requested the accounting on August 10, 2016, plaintiff provided it one day later, and two months thereafter this action was commenced. The court finds that plaintiff timely objected to the accounting, insofar as accounting fails to provide a basis for the reasonableness of the attorneys fees collected.

While it is true that the co-op was entitled to recover the legal fees and costs accrued up to the time of the sale pursuant to the proprietary lease, this recovery is only for reasonable attorneys fees. Without itemized bills and an affirmation attesting to the work performed, the reasonableness of the amounts for attorneys fees withheld by the co-op cannot be determined. Further, plaintiff has failed to raise a triable issue of fact as to the legal fees or any other amount withheld by the co-op in connection with the excess proceeds from the sale of the unit.

Accordingly, the co-op defendants motion for summary judgment on the third and fourth causes of action must be denied at this juncture.

The fifth cause of action, for conversion, must be dismissed. The elements of a cause of action in conversion are the plaintiff's right to possession, intent of the defendant, and defendant's interference with plaintiff's property rights to the exclusion of plaintiff's rights (*Komolov v. Segal*, 101 AD3d 639 [1st Dept 2012]). Plaintiff seeks to recover for alleged conversion of her personal property as a result of her eviction. This claim fails as a matter of law because plaintiff cannot demonstrate that the co-op defendants exercised dominion or control over her personal property since they did not take possession of same after plaintiff was evicted but before plaintiff moved said items out of the unit. Further, Paragraphs 21(c) and 31 of the proprietary lease bars plaintiff's claim for conversion. Therefore, the fifth cause of action is severed and dismissed.

The sixth cause of action, for negligent bailment, is dismissed. A landlord does not become a bailee of personal property left by a tenant absent agreement otherwise (*Funding Assistance Corp. v. Mashreq Bank, PSC*, 277 AD2d 127 [1st Dept 2000]).

Finally, the last claim against the co-op defendants, the ninth cause of action for breach of warranty, must also be dismissed. Plaintiff's claims were or could have been litigated in her four small claims cases and three housing part proceedings insofar as her claims are based upon the same alleged conditions plaintiff previously claimed then-existed. Since plaintiff cannot demonstrate that she was denied a full and fair opportunity to litigate the underlying issues, her claims are barred by the doctrine of *res judicata*. Otherwise, the co-op defendants have demonstrated entitlement to judgment as a matter of law on this claim as well, on the merits.

The court denies summary judgment on the co-op defendants' counterclaim for attorneys fees at this juncture, since there remain triable issues of fact as to amounts withheld from the sale proceeds.

Plaintiff's cross-motion for an accounting is granted to the extent that the co-op defendants are directed to provide a detailed accounting of the sale of the unit including line-by-line itemization of the legal fees along with an affirmation attesting to the reasonableness of the attorneys fees.

Further, insofar as there is no dispute that discovery has not been exchanged in this action, the parties are directed to appear for a preliminary conference on December 5, 2017 at 9:30am.

## CONCLUSION

In accordance herewith, it is hereby:

**ORDERED** the motion for summary judgment is granted only to the extent that the first, second, fifth, sixth and ninth causes of action are severed and dismissed; and it is further

**ORDERED** that the motion for summary judgment is otherwise denied; and it is further

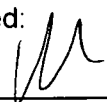
**ORDERED** that the cross-motion for partial summary judgment is granted only to the extent that, within 60 days from service of this decision/order with notice of entry, the co-op defendants are directed to provide a detailed accounting of the sale of the unit including line-by-line itemization of the legal fees along with an affirmation attesting to the reasonableness of the attorneys fees; and it is further

**ORDERED** that the cross-motion is otherwise denied; and it is further

**ORDERED** that the parties are directed to appear for a preliminary conference on December 5, 2017 at 9:30am.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 10/25/17  
New York, New York

So Ordered:   
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Hon. Lynn R. Kotler, J.S.C.